Filed 5/16/07 P. v. Thompson CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DERRICK DWAYNE THOMPSON, Defendant and Appellant.	B189584 (Los Angeles County Super. Ct. No. SA051591)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert P. O'Neill and Stephanie Sautner, Judges. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Derrick Dwayne Thompson appeals from the judgment entered following his second degree robbery conviction. He argues the trial court abused its discretion in denying his request for appointment of an eyewitness identification expert. He contends the court erroneously found that certain evidence destroyed by police was not exculpatory, and not destroyed in bad faith. He also argues that the sanction imposed for the destruction and for the prosecutor's alleged discovery violation is inadequate. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On January 17, 2004 (all further dates are in 2004, unless otherwise indicated), at about 7:30 p.m., Maricela Armstrong and her two daughters were walking towards their van. Armstrong noticed the passenger of a big red car turn and look at her. As she was helping her daughters get into the van, Armstrong heard the sound of a car driving in reverse. When she turned around, she saw a man exit the red car and walk towards her. The man grabbed her and slammed her into the sidewalk. She attempted to fight him off.

Armstrong saw that the attacker was holding something shiny, and she felt something sharp against her throat. Her daughter later told her that the object was a knife. After learning the attacker wanted her purse, Armstrong threw it at him and rushed over to her daughters. The attacker walked back to the car, which then drove away. Armstrong chased after the car, got the license plate number, and repeated "2MCR440" out loud over and over until she was able to write it down in the van. She identified appellant as the attacker.

The next day, January 18, at about 5:40 p.m., a reddish-colored car stopped to let Arcelia C. Miranda cross the street. She noticed that the two men in the car were "looking around," and the passenger seemed frightened. The car was being driven very slowly, and then it stopped. The passenger exited the car and approached Miranda with a knife in hand. He put the knife to her chest, drew blood and Miranda began screaming. As they struggled, she grabbed his wrists, and he made slashing motions towards her neck. When a nearby man began yelling, the attacker knocked Miranda to the ground,

took her purse, which contained her cell phone, and ran back to the car. In court, Miranda identified appellant as the driver of the car.

Marta Zaragoza, an eyewitness to the Miranda robbery, told police that the license plate number of the car was "2NCR," and possibly "4." A couple of days later, Zaragoza saw the car again and reported that she had made a mistake; the license plate read "2MCR4." She did not see the last two digits. Zaragoza identified appellant as the person she saw driving the car a couple of days after the robbery. Officers traced the license plate number, 2MCR440, to Jacklyn Meadows, appellant's fiancé. Meadows testified that only she and appellant had access to the car. Both Miranda and Zaragoza identified Meadows's car as the one involved in the robbery. When officers searched the residence shared by appellant and Meadows, they found a knife and a cell phone.

Detective Randy Vickery took the knife and cell phone to Miranda's place of employment. There, Miranda immediately recognized the cell phone as her own, but the battery was dead so she could not confirm it. She got "very upset" when she saw the knife. It had a black handle and was serrated like the one used by her attacker, and was similar in size. When asked if it was the actual knife used by her attacker, she testified, "How can I prove that? I just know [it's] very similar." Later, Miranda took a phone charger to the police station and plugged it into the cell phone recovered from appellant's residence. Miranda confirmed it was her cell phone when she turned it on and the screen displayed her phone number.

When Detective Vickery told appellant that he had a cell phone belonging to one of the robbery victims, appellant stated that he was "in a fucked up situation," and that the police "have him." Appellant also told Detective Vickery that "he was going to jail." When asked about the other suspect in the case, appellant said that Detective Vickery was "only trying to make [his] case stronger," and that appellant "wasn't going to go to prison or jail as a snitch."

Appellant was charged with two counts of second degree robbery. (Pen. Code, § 211.)[1] The trial court granted his request for self-representation, and appellant remained in propria persona through the verdict. The jury was deadlocked on the robbery of Armstrong, but found appellant guilty of robbing Miranda. In a bifurcated proceeding, the trial court found prior conviction allegations to be true. Appellant's new trial motion was denied. Because of an error in the superior court, appellant's notice of appeal was not processed in a timely manner. We granted appellant's petition for relief from default, and now consider the merits of his appeal.

DISCUSSION

I

Appellant argues the trial court abused its discretion in denying his request for appointment of an eyewitness identification expert. Prior to trial, appellant requested indigent funds, appointment of an investigator, appointment of a forensic examiner and DNA expert, and appointment of an eyewitness identification expert. The court granted the first two requests, but denied the latter two because appellant did not show good cause. Appellant later renewed his request for an eyewitness identification expert, which was denied without prejudice. Appellant was instructed to provide the court with the proposed expert's resume and a summary of costs. Upon doing so, the court scheduled a hearing and gave the prosecution 10 days to file opposition.

Appellant's written motion stated that "testimony of identification will become an issue making it totally nessesary [*sic*] to involve the testimony of an eyewitness identification expert in the presentation of defendant['s] defense." He went on to explain that identification testimony would be "an issue" because "directly after incident victum [*sic*] Miranda was not able to give any description of driver, fail[ed] to identify me out of a 6-pack line-up, victum [*sic*]Armstrong also directly after incident [gave description] of 6 feet, 180 pounds, [whereas] I'm 6.5 1/2 and 250 as of my arrest, fail[ed] to ID me out

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[1] All further statutory references are the Penal Code.

of 2 separate 6 pack identification interviews by detectives, and failed to pick me out of live line-up. Victums [*sic*] were given oppertunities [*sic*] to ID me but failed all times, then came to court for pre-lim 7 months later and ID'ed [*sic*] me as suspect, being the only individual in restraints. [¶] It has become more then [*sic*] clear that an identification expert is needed." (Emphasis in original.) At the hearing, the court denied appellant's request.

"It cannot be doubted that the right to counsel guaranteed by both the federal and state Constitutions includes, and indeed presumes, the right to effective counsel [citations], and thus also includes the right to reasonably necessary ancillary defense services." (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319, fns. omitted.) "Evidence Code section 730 authorizes the trial court to appoint an expert to render advice and to testify as a witness, and Evidence Code section 731 and Government Code section 29603 state that the county must pay for those court-ordered expenses." (*People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1303-1304, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.)

"Expert testimony on the psychological factors affecting eyewitness identification is often unnecessary." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 995.) Thus, it is the defendant's burden to prove that an eyewitness identification expert is reasonably necessary to his defense "by reference to '"the general lines of inquiry he wishes to pursue, being as specific as possible."'" (*Corenevsky v. Superior Court*, *supra*, 36 Cal.3d at p. 320; *People v. Gaglione*, *supra*, 26 Cal.App.4th at p. 1304.) "This requirement applies both to indigent defendants represented by counsel and to those who choose to represent themselves." (*People v. Blair* (2005) 36 Cal.4th 686, 733.)

"[I]t has been recognized that because of the early stage at which the request typically arises, it will often be difficult . . . to demonstrate a clear need for such funds. [Citation.] Therefore the trial court should, in appropriate circumstances, 'view with considerable liberality a motion for such pre-trial assistance.'" (*Corenevsky v. Superior Court, supra*, 36 Cal.3d at p. 320.) "The decision on the need for the appointment of an expert lies within the discretion of the trial court and the trial court's decision will not be

set aside absent an abuse of that discretion." (*People v. Gaglione*, *supra*, 26 Cal.App.4th at p. 1304.) Further, the trial court's "order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Corenevsky v. Superior Court*, *supra*, 36 Cal.3d at p. 321.)

Appellant made only a weak showing of need. Although he informed the court of the reasons why eyewitness identifications would be "an issue" in this case, there was no mention of the "'general lines of inquiry he wishe[d] to pursue.'" (*Corenevsky v. Superior Court*, *supra*, 36 Cal.3d at p. 321.) Appellant also did not show that in the absence of expert testimony, there were identification factors that were not likely to be fully known or understood by the jury. (See *People v. Gaglione*, *supra*, 26 Cal.App.4th at p. 1305.) On appeal, appellant points to factors such as the swiftness of the robberies, the certainty of the identifications, the cross-racial nature of one of the identifications and the suggestive practice of putting a suspect in the same position in a live lineup and a photographic lineup, but appellant did not present any of this to the trial court when making his request for an eyewitness identification expert. "Error is not shown on appeal by urging reasons for the [eyewitness identification expert] not presented to the court." (*People v. Beardslee* (1991) 53 Cal.3d 68, 100.) The court did not abuse its discretion in denying appellant's request.

Nevertheless, appellant argues the judgment should be reversed because the court focused on whether the eyewitness identifications were substantially corroborated, instead of whether he demonstrated that an eyewitness identification expert was reasonably necessary to his defense.[2] We reject appellant's argument because we review

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[2] The trial court denied appellant's request for appointment of an eyewitness identification expert after finding that "under the *McDonald* standard there's independent corroborative evidence giving reliability to the identification . . . ." In *People v. McDonald, supra,* 37 Cal.3d at page 377, the Supreme Court, in deciding whether the trial court abused its discretion by excluding eyewitness identification expert testimony, held that "[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological

the correctness of the trial court's ruling, not its rationale. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

In any event, any error was harmless. The jury was informed of the weaknesses in the eyewitness identifications. Evidence was presented that Miranda did not positively identify appellant at either a photographic lineup or a live lineup, and that her identification of appellant as the driver at the preliminary hearing was equivocal. And even though Miranda testified in court that appellant was the driver, the jury also heard her testimony that her focus was on the attacker, that she did not see the driver outside of the car, and that she was unable to provide a good description of the driver after the robbery. As for Zaragoza, she testified that her identification of appellant was not from her memory of the robbery, but from seeing him a couple of days later in the same car as the one used in the robbery.

In closing argument, appellant also touched on the cross-racial factor, stating that "[t]here are hundreds of African-Americans, and I believe that if anyone with a bald head would have been caught in the vehicle because of the vehicle, I believe they would have been where I'm at right now." Appellant's investigator, a former police detective, testified that it is suggestive to put a suspect in the same position in a photographic lineup as a live lineup.

The jury was given a modified version of CALJIC No. 2.92, which reads in part: "In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following: [¶] [The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;] [¶] [The stress, if any, to which the witness was subjected at the time of the observation;] [¶] [The witness ability, following the observation, to

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factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony."

provide a description of the perpetrator of the act;] [¶] [The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;] [¶] [The cross-racial [or ethnic] nature of the identification;] [¶] . . . [¶] [Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;] [¶] [The period of time between the alleged criminal act and the witness' identification;] [¶] . . . [¶] [The extent to which the witness is either certain or uncertain of the identification;]." The jury was also given a modified version of CALJIC No. 2.91, which instructs: "If, after considering the circumstances of the identification [and any other evidence in this case], you have a reasonable doubt whether defendant was the person who committed the crimes, you must give the defendant the benefit of that doubt and find [him] not guilty."

Additionally, there was considerable evidence to corroborate the identifications: appellant had access to and was seen driving the car involved in the robbery, Miranda's phone was found at appellant's residence, a knife that was "very similar" to the one used in the robbery also was found at his residence, and appellant made incriminating statements regarding the robbery of Miranda. In arguing prejudice, appellant emphasizes that the jury was deadlocked seven to five for acquittal on the robbery of Armstrong, but he has not demonstrated that "he was deprived of a fair trial or otherwise suffered prejudice from the denial of his request for [appointment of an eyewitness identification expert]." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1086.)

II

Appellant argues the trial court erred in finding that the destruction of a knife and cell phone was not in bad faith, and in finding that the knife and cell phone were not exculpatory. He also contends that the sanction imposed by the court for the destruction and the prosecutor's alleged discovery violation was inadequate. On January 27, nine days after the robbery of Miranda, Detective Emery Eccles seized a knife and a cell phone from appellant's residence. Officer Eccles gave the items to Detective Vickery, who then showed them to Miranda for identification. The knife and cell phone were later booked into evidence. On August 30, appellant moved for the production of "all physical

evidence obtained as part of this investigation." On September 27, he made the same discovery request.

On September 30, Marguerite Rizzo, the prosecutor at the time, was informed by a police officer that he was unable to find the knife, but that he would keep looking for it. The case was then transferred from Rizzo to Mark Goldman. On January 21, 2005, Goldman was informed, for the first time, that the knife and cell phone had been inadvertently destroyed. Goldman informed the court and appellant of this revelation that same day. He also told them that police were looking for photographs of the items. Later that day, Goldman told the court and appellant that he had been informed that there were no photographs of the knife or cell phone. He also explained that Detective Vickery had authorized the destruction of some nonmaterial evidence, but that the knife and cell phone were mistakenly destroyed together with the nonmaterial items. The evidence was destroyed on September 7. The court stated its intent to instruct the jury that it could consider the evidence destruction. Appellant did not complain that the instruction would be an inadequate sanction.

Later, appellant moved to dismiss because of the destruction of "crucial, pertinent, [and] absolute[ly] necessary evidence in the matter before the court." The court denied the request, finding that the knife and the cell phone were not exculpatory, and that the evidence was not destroyed in bad faith. The court again stated its intent to instruct the jury that the destruction could be considered in determining the weight and significance of the knife and the cell phone. Appellant did not request a different jury instruction. Later, while discussing jury instructions, the court stated that it planned to instruct the jury that "[t]he police have a duty to preserve existing evidence in their possession. The weight and significance of any destroyed evidence are matters for your consideration. However, you should consider whether destroyed evidence pertains to a fact of importance, something trivial, or [subject matters] already established by other credible evidence." Appellant did not object. The jury was given that exact instruction.

"The state has a duty to preserve evidence that both possesses 'an exculpatory value that was apparent before the evidence was destroyed,' and is of 'such a nature that

the defendant would be unable to obtain comparable evidence by other reasonably available means.' [Citation.] Moreover, a constitutional violation is not established unless the authorities acted in bad faith in failing to preserve potentially useful evidence." (*People v. Schmeck* (2005) 37 Cal.4th 240, 283.)

Appellant argues the trial court erred in finding that the knife and cell phone were not exculpatory. The exculpatory value of the evidence must be apparent before the evidence is destroyed. Miranda confirmed that the cell phone was hers, and said the knife was "very similar" to the one used in the robbery. The evidence was clearly inculpatory. Appellant claims that the knife did not have a serrated edge, as Miranda claimed the one used in the robbery did, because Eccles testified that one side of the knife is "sharp and the other side is . . . straight." When asked if the knife was serrated, Eccles stated he did not remember. Miranda testified that when Vickery showed her the knife, it was serrated. The mere possibility that the evidence "may ultimately prove exculpatory 'is not enough to satisfy the standard of constitutional materiality.'" (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 8.) The trial court's finding is supported by substantial evidence. (See *People v. Carter* (2005) 36 Cal.4th 1215, 1246.)

We also reject appellant's contention that it was error to conclude that the knife and cell phone were not destroyed in bad faith. Appellant points out that: (1) no explanation was given as to why, for 18 days, the items were not booked into evidence; (2) no explanation was given as to what was done with the items during those 18 days; (3) no police report mentioned that the knife had blood on it and was serrated, even though Miranda testified to those facts; and (4) no explanation was offered as to why there were no photographs. None of this establishes that police destroyed the knife and cell phone purposefully, or in bad faith. Appellant has the burden of proving bad faith, and did not do so. (See *People v. Memro* (1995) 11 Cal.4th 786, 831.) The trial court's finding is proper, as is its denial of appellant's request to dismiss the charges. (See *People v. Wimberly* (1992) 5 Cal.App.4th 773, 792-793.)

Finally, appellant argues that the jury instruction given, a "watered down version of CALJIC [No.] 2.28," was an inadequate sanction for the evidence destruction and the

prosecutor's alleged violation of discovery rules.[3] The trial court has broad discretion in deciding the appropriate sanction for the destruction of material evidence or for discovery abuse. (*People v. Memro*, *supra*, 11 Cal.4th at p. 831; *People v. Jenkins* (2000) 22 Cal.4th 900, 951.) Appellant contends that the trial court should have instructed the jury that based on the missing evidence, it could draw an adverse inference sufficient to raise a reasonable doubt, that photographs were required to be taken, that the jury could draw an adverse inference from the absence of photographs, and that evidence is required to be made available 30 days before trial. Appellant did not request that the trial court

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[3] CALJIC No. 2.28 reads: "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. [Concealment of evidence] [and] [or] [[D][d]elay in the disclosure of evidence] may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the [People] [Defendant[s]] . . . [concealed] [and] [or] [failed to timely disclose] the following evidence: . . . [¶] Although the [People's] [Defendant's] [concealment] [and] [or] [failure to timely disclose evidence] was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] [If you find that the [concealment] [and] [or] [delayed disclosure] was by the defendant . . . personally, or was authorized by, or done at the direction and control of the defendant, and relates to a fact of importance, rather than something trivial, and does not relate to subject matter already established by other credible evidence, you may consider [concealment] [and] [or] [delayed disclosure] as evidence tending to show the [defendant's consciousness of guilt]. . . . However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.] [¶] [A defendant's failure to timely disclose the evidence [he] [she] intends to produce at trial may not be considered against any other defendant[s] [unless you find that the other defendant[s] authorized the failure to timely disclose].] [¶] [If you find that the [concealment] [and] [or] [delayed disclosure] was by the prosecution, and relates to a fact of importance rather than something trivial, and does not relate to subject matter already established by other credible evidence, you may consider that [concealment] [and] [or] [delayed disclosure] in determining the [[believability] [or] [weight] to be given to that particular evidence[.] [[, or] [. . .].]" This instruction has been recognized as "problematic." (See *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1247; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942.)

make these additions. (See *People v. Saucedo*, *supra*, 121 Cal.App.4th at p. 942 [recognizing that if defendant wanted CALJIC No. 2.28 modified, he should have requested so in the trial court].) The jury instruction given was reasonable under the circumstances, and the court did not abuse its discretion.

Appellant summarily argues that the instruction given "eroded the concept of reasonable doubt." We disagree. Although the jury was not explicitly instructed that it could draw an adverse inference from the missing evidence sufficient to raise a reasonable doubt, the jury was told that it should consider the destruction in determining weight and significance. And through jury instructions and closing argument, the jury was repeatedly reminded that the People had to prove guilt beyond a reasonable doubt.

III

We reject appellant's argument that cumulative prejudice exists as we have not found any errors, and in the "instances where we have assumed error for purposes of discussion . . . we have not found prejudice or, indeed, any significant adverse impact." (*People v. Holloway* (2004) 33 Cal.4th 96, 142.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J. SUZUKAWA, J.